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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT TACOMA

11 NANCY IPOX, a single woman,  
12 Plaintiff,

13 v.

14 EHC FINANCIAL SERVICES, LLC., a  
15 Washington Limited Liability Corporation,  
16 Defendant.

CASE NO. C07-5606RJB

ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANT'S MOTION TO  
COMPEL, DEFENDANT'S  
MOTION FOR PROTECTIVE  
ORDER, AND PLAINTIFF'S  
MOTION FOR PROTECTIVE  
ORDER AND ATTORNEYS'  
FEES

17 This matter comes before the Court on Defendant's Motion to Compel (Dkt. 38),  
18 Defendant's Motion for Protective Order (Dkt. 40), and Plaintiff's Motion for Protective Order  
19 and Attorneys' Fees (Dkt. 42). The Court has considered the pleadings filed in support of and in  
20 opposition to the motions and the remainder of the file herein.

21 **I. FACTUAL AND PROCEDURAL BACKGROUND**

22 The facts, according to the amended complaint, are as follows: Plaintiff Nancy Ipox is a  
23 former employee of Defendant EHC Financial Services, LLC ("EHC"). Ms. Ipox was first  
24 employed in EHC's Vancouver, Washington office in October of 2005 on a part time basis. In  
25 March of 2006, Ms. Ipox began working full time as an accounts payable clerk. In December of  
26 2006, Ms. Ipox was promoted. In March of 2007, Ms. Ipox requested leave to undergo back  
27 surgery. On March 30, 2007, EHC formally approved Ms. Ipox's leave request; her leave was to  
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1 commence on April 27, 2007, and end on July 1, 2007. Approximately two weeks before Ms.  
2 Ipox's leave commenced, Tabura Jones, Ms. Ipox's direct supervisor, hired a temporary employee  
3 to work during Ms. Ipox's absence.

4 While on leave, Ms. Ipox's physician informed Ms. Ipox that she could return to work on  
5 a half time basis beginning June 18, 2007. On May 31, 2007, Ms. Ipox notified Ms. Jones that she  
6 would be able to return to work early. On June 12, 2007, Ms. Ipox was informed that her  
7 employment was being terminated. When Ms. Ipox went to EHC on June 15, 2007, Ms. Ipox was  
8 told that her position had been eliminated.

9 Ms. Ipox brings claims for violation of the FMLA and wrongful discharge in violation of  
10 public policy. Dkt. 6.

## 11 **II. DISCUSSION**

12 Defendant EHC Financial Services, LLC ("EHC") moves for an order compelling Plaintiff  
13 to specifically identify Plaintiff's mental healthcare providers and to describe her emotional  
14 distress damages with particularity, or, in the alternative, to strike any allegations or claims for  
15 emotional distress damages. Dkt. 38. Both parties have moved for entry of a protective order to  
16 protect Ms. Ipox's medical records. Dkt. 4; Dkt. 42. EHC further seeks to protect private  
17 information of EHC's employees who are not parties to this matter. Dkt. 40.

### 18 **A. EFFORTS TO CONFER**

19 As a threshold matter, the parties dispute whether they have engaged in a good faith effort  
20 to confer. A motion to compel or for a protective order must certify that the parties have made a  
21 good faith effort to confer and resolve the dispute themselves. Fed. R. Civ. P. 37(a)(1); Fed. R.  
22 Civ. P. 26(c)(1). A good faith effort to confer "requires a face-to-face meeting or a telephone  
23 conference." Local Rule CR 37(a)(2)(A).

24 According to EHC, the parties conferred by telephone on matters raised in EHC's motions  
25 to compel and for a protective order. Dkt. 39 at 1; Dkt. 41 at 1. Ms. Ipox's counsel contends that  
26 counsel for the parties have not met and conferred regarding matters raised in the motions. Dkt.  
27 46 at 2; Dkt. 44 at 2. In addition, while Ms. Ipox's counsel cites attempts to confer via  
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1 correspondence, such attempts do not qualify as good faith efforts to confer under Local Rule CR  
2 37(a)(2)(A). Nevertheless, in the interest of resolving this discovery dispute and allowing the  
3 parties to proceed with discovery, the Court will address the substance of the motions.

4 **B. DEFENDANT'S MOTION TO COMPEL**

5 Federal Rule of Civil Procedure 26 governs discovery and provides, in part, as follows:

6 Parties may obtain discovery regarding any nonprivileged matter that is  
7 relevant to any party's claim or defense--including the existence, description,  
8 nature, custody, condition, and location of any documents or other tangible things  
9 and the identity and location of persons who know of any discoverable matter. For  
10 good cause, the court may order discovery of any matter relevant to the subject  
matter involved in the action. Relevant information need not be admissible at the  
trial if the discovery appears reasonably calculated to lead to the discovery of  
admissible evidence. All discovery is subject to the limitations imposed by Rule  
26(b)(2)(C).

11 Fed. R. Civ. P. 26(b)(1). Discovery must be limited if the Court determines that the discovery  
12 sought is unreasonably cumulative or duplicative or is obtainable from a more convenient, less  
13 burdensome, or less expensive source; that the seeking party has had ample opportunity to obtain  
14 the information sought; or that the burden or expense of the discovery request outweighs its  
15 likely benefit. Fed. R. Civ. P. 26(b)(2)(C). If a party fails to answer an interrogatory or a request  
16 for production or objects, the requesting party may move to compel disclosure pursuant to  
17 Federal Rule of Civil Procedure 37. Fed. R. Civ. P. 37(a)(3)(B).

18 EHC seeks to compel responses to the following interrogatories:

19 INTERROGATORY NO. 3: Explain how and in what amount Ipox, as a  
20 result of EHC's alleged conduct, has incurred and will continue to incur expenses  
21 for medical and/or mental health treatment and medication. Include in your  
answer an explanation as to how Ipox has determined the amount of her expenses  
for treatment and medication.

22 INTERROGATORY NO. 4: Identify all medical and mental health  
professionals or other individuals and entities who treated Ipox, from June 12,  
1997 to present.

23 INTERROGATORY NO. 5: Describe the mental distress EHC caused  
Ipox to suffer.

24 INTERROGATORY NO. 6: Describe Ipox's mental health treatments,  
25 medications, therapies, and counseling, and the conditions, from June 12, 1997 to  
present.

26 Dkt. 38 at 2-3.

1 In her responses to these interrogatories, Ms. Ipox identified several medical professionals,  
2 objected on the grounds that her “medical conditions may be covered by a protective order,” and  
3 agreed to supplement her responses “as additional information concerning Plaintiff’s medical  
4 conditions is obtained.” Dkt. 39-4, Exh. 3 at 5-9.

5 Ms. Ipox contends that the documents EHC seeks are privileged and that Ms. Ipox has  
6 not waived the privilege by virtue of her claims in this matter. Dkt. 45 at 5-6. The Supreme Court  
7 has held that “confidential communications between a licensed psychotherapist and her patients in  
8 the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of  
9 the Federal Rules of Evidence.” *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996). As with other  
10 privileges, this psychotherapist-patient privilege may be waived by the patient. *Id.* at 15 n.14.

11 To determine whether the psychotherapist-patient privilege has been waived by a plaintiff  
12 seeking damages for emotional distress, other courts in this district have adopted the reasoning in  
13 *Fitzgerald v. Cassil*, 216 F.R.D. 632, 639 (N.D.Cal. 2003). *Uzzell v. Teletech Holdings, Inc.*,  
14 2007 WL 4358315, at \*2 (W.D.Wash. Dec. 7, 2007); *Sims v. Lakeside School*, 2007 WL  
15 5417731, at \*1 (W.D.Wash. March 15, 2007). In *Fitzgerald*, the court found no waiver of the  
16 psychotherapist-patient privilege where the plaintiffs stipulated that they would not “affirmatively  
17 rely on any treating psychotherapist or other expert to prove the emotional distress damages,” the  
18 plaintiffs did not assert a cause of action for intentional or negligent infliction of emotional  
19 distress, and the plaintiffs did not allege “a specific psychiatric injury or disorder or unusually  
20 severe emotional distress extraordinary in light of the allegations.” *Fitzgerald*, 216 F.R.D. at 639.

21 In this case, Ms. Ipox seeks damages for emotional distress. Dkt. 6 at 6. It is unclear  
22 whether Ms. Ipox alleges specific or severe psychiatric injuries or disorders and whether Ms. Ipox  
23 will rely on medical records or expert testimony to support her request for emotional distress  
24 damages. There are sundry reasons why Ms. Ipox may elect not to rely on such evidence. By  
25 asserting that she has suffered emotional distress damages, however, Ms. Ipox has put her mental  
26 health at issue in this case. Therefore, EHC is entitled to explore the basis for Ms. Ipox’s claimed  
27 emotional distress damages, if any. The Court should therefore grant EHC’s motion to compel.

1 Ms. Ipox also contends that the scope of the requested discovery is too broad and that she  
2 should not be required to produce medical records created in the past ten years and should only  
3 be required to produce medical records created during, or after, her employment with EHC. Dkt.  
4 45 at 6. EHC contends that “Plaintiff’s mental health information dating back to 1997 is relevant  
5 because it may identify causes, other than EHC, for Plaintiff’s alleged emotional distress.” Dkt. 38  
6 at 8. This is a proper inquiry, and Ms. Ipox has failed to demonstrate that the request is unduly  
7 burdensome.

8 Ms. Ipox is the master of her complaint. It is within her power to preserve the  
9 psychotherapist-patient privilege by asserting no claims or damages for emotional distress.  
10 Instead, Ms. Ipox seeks emotional distress damages and has put her mental health at issue and  
11 made her mental health records subject to discovery. If Ms. Ipox prefers to keep her mental health  
12 a private matter, she may withdraw her request for emotional damages.

13 Finally, Ms. Ipox opposes the motion on the grounds that she should be afforded the  
14 opportunity to produce her medical records under a protective order. Dkt. 45. Accordingly, Ms.  
15 Ipox has moved for the entry of a protective order, and that motion is addressed below. Dkt. 42.

### 16 **C. MOTIONS FOR PROTECTIVE ORDER**

17 Protective orders are governed by Federal Rule of Civil Procedure 26(c), which  
18 provides in part as follows:

19 In General. A party or any person from whom discovery is sought  
20 may move for a protective order in the court where the action is pending--or as  
21 an alternative on matters relating to a deposition, in the court for the district  
22 where the deposition will be taken. The motion must include a certification that  
23 the movant has in good faith conferred or attempted to confer with other  
24 affected parties in an effort to resolve the dispute without court action. The court  
25 may, for good cause, issue an order to protect a party or person from annoyance,  
26 embarrassment, oppression, or undue burden or expense.

27 Fed. R. Civ. P. 26(c)(1).

28 Counsel for both parties apparently agree that Ms. Ipox’s medical files should be  
protected. The Health Insurance Portability and Accountability Act (“HIPAA”), 42 U.S.C. §  
1320d *et seq.* restricts disclosure of protected health care information. Regulations authorized by  
HIPAA permit disclosure of protected health information in judicial proceedings in response to

1 subpoenas or discovery requests if the party seeking the information provides satisfactory  
2 assurance that it has made reasonable efforts to secure a protective order that both prohibits the  
3 parties from using or disclosing the protected health information for any purpose other than the  
4 litigation and requires the return or destruction of the protected health information at the end of  
5 the litigation or proceeding. 45 C.F.R. § 164.512(e)(1)(ii), (v). There is good cause to protect  
6 Ms. Ipox's medical records from disclosure, and a protective order is therefore warranted.

7 EHC seeks protection of additional information, and Ms. Ipox disputes the request. Ms.  
8 Ipox contends that EHC failed to timely object in responses to discovery requests and therefore  
9 has waived the right to seek a protective order. Dkt. 43 at 8. While EHC's objections may be  
10 untimely, Ms. Ipox fails to demonstrate any prejudice. Moreover, EHC's objections relate to the  
11 privacy concerns of individuals who are not parties to this matter. Therefore, this discovery  
12 dispute should also be addressed on its merits.

13 EHC contends that redaction of the private information of EHC's employees is proper.  
14 Dkt. 40 at 6. Specifically, EHC seeks to redact social security numbers, residential addresses and  
15 phone numbers, medical and financial information, dates of birth, and dependent information. *Id.*

16 First, social security numbers, taxpayer identification numbers, dates of birth, and  
17 financial account numbers constitute private information that should be redacted in filings with  
18 the Court. Fed. R. Civ. P. 5.2(a). Similar policy concerns govern the disclosure of such  
19 information in discovery. Accordingly, the Court finds good cause to grant EHC's Motion for  
20 Protective Order (Dkt. 40) insofar as EHC seeks to redact this information. To the extent that  
21 information and materials responsive to Ms. Ipox's discovery requests contain employees'  
22 personal information, EHC shall redact such personal information and disclose only the year of  
23 any employee's birth, and the last four digits of any employee's social security number,  
24 taxpayer identification number, and financial account number.

25 Second, EHC has failed to demonstrate good cause to redact its employees'  
26 residential addresses and telephone numbers, however. In this respect, the Court should  
27 deny EHC's Motion for Protective Order (Dkt. 40).

1 Third, EHC seeks a protective order “permit[ting] EHC to redact medical and  
2 mental health information related to its employees from its discovery responses.” Dkt. 40  
3 at 5. The Court previously granted a motion to compel EHC to produce “documents  
4 concerning any employee’s request for time off for a serious health condition pursuant to  
5 the FMLA; policies, procedures, and comments regarding the FMLA; and all documents  
6 of leave taken.” Dkt. 35 at 7. In granting the motion, the Court noted, “[I]t appears that  
7 EHC can comply with the request without the entry of a protective order” because Ms.  
8 Ipox sought only redacted information. *Id.* at 8.

9 EHC now contends that the Court’s previous order is limited to FMLA-related  
10 medical information and that an order protecting all employee medical information is  
11 warranted. *See* Dkt. 40 at 5 n.1. Ms. Ipox does not seek information about medical  
12 conditions suffered by EHC’s other employees and therefore proposes that EHC redact  
13 its employees’ medical information from documents that are otherwise discoverable and  
14 maintain a log of the redacted information. Dkt. 43 at 7. This is an appropriate solution,  
15 and EHC’s Motion for Protective Order (Dkt. 40) should be granted in this regard.

#### 16 **D. SUBSTANCE OF PROPOSED PROTECTIVE ORDERS**

17 Both parties have provided proposed protective orders that are deficient in several  
18 respects. By letter to the parties, the Court previously declined to enter a stipulated  
19 protective order providing, “This Protective Order shall survive the final termination of  
20 this action unless the parties otherwise agree in writing.” Dkt. 22-2 at 6; Dkt. 24  
21 (“Fourth, the proposed order provides that the court shall retain jurisdiction on an  
22 indefinite basis. *See* ¶ 13. Once a case is concluded, I choose not to retain jurisdiction  
23 over a collateral matter such as this.”). EHC’s proposed order ignores the Court’s letter  
24 to the parties. *See, e.g.*, Dkt. 40-2 at 6 (“This Protective Order shall survive the final  
25 termination of this action, and the Court shall retain jurisdiction to resolve any dispute  
26 concerning the use of information disclosed hereunder.”). The proposed order offered by  
27 Ms. Ipox’s counsel is also inadequate. *See* Dkt. 24 at 2; Dkt. 42-2 at 2-3. The Court  
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1 therefore declines to adopt either party's proposal, and the protective orders have been  
2 redrafted.

### 3 **E. FEES AND SANCTIONS**

4 Counsel for EHC seeks attorney's fees and costs incurred in moving to compel.  
5 Dkt. 38 at 9. Counsel for Ms. Ipox similarly seeks an award of attorneys' fees and  
6 sanctions. Dkt. 42 at 10. The Court must award reasonable expenses to the moving party  
7 if the party's motion to compel or for a protective order is granted unless an award of  
8 expenses would be unjust. Fed. R. Civ. P. 37(a)(5)(A)(iii).

9 In this case, it appears that the parties were in substantial agreement as to the need  
10 to protect Ms. Ipox's medical information and as to the redaction of certain personal  
11 information pertaining to EHC's current and former employees. It also appears that  
12 while the parties may have conferred generally about the need for a protective order and  
13 about EHC's outstanding discovery requests, this discovery dispute should have been  
14 resolved without Court intervention. The Court therefore finds that an award of expenses  
15 to either party is unwarranted and would be unjust. In this respect, Defendant's Motion  
16 to Compel (Dkt. 38) and Plaintiff's Motion for Protective Order and Attorneys' Fees  
17 (Dkt. 42) should be denied.

### 18 **III. ORDER**


19 Therefore, it is hereby

20 **ORDERED** that Defendant's Motion to Compel (Dkt. 38) is **GRANTED in part**  
21 and **DENIED in part**, Defendant's Motion for Protective Order (Dkt. 40) is **GRANTED**  
22 **in part** and **DENIED in part**, and Plaintiff's Motion for Protective Order and  
23 Attorneys' Fees (Dkt. 42) **GRANTED in part** and **DENIED in part**. The Court is  
24 issuing a protective order simultaneously with this order.



1 The Clerk is directed to send uncertified copies of this Order to all counsel of  
2 record and to any party appearing *pro se* at said party's last known address.

3 DATED this 7<sup>th</sup> day of October, 2008.

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5 ROBERT J. BRYAN  
6 United States District Judge  
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